Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DAVID THOMAS RHODES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. **Is it interrogation when law enforcement officers ask an arrested individual to acknowledge ownership of a vehicle suspected of containing illicit drugs?**

B. **Was the defendant denied due process of law when the Tenth Circuit used an incorrect harmless error analysis when observing that the defendant could not have suppressed enough of the evidence to make it something other than overwhelming rather than an analysis after pondering all that happened without stripping the erroneous action from the whole?**

C. **Was the defendant denied due process of law when the Tenth Circuit invoked a higher standard for issuing a Certificate of Appealability when it required the defendant to meet the ultimate burden of a showing of prejudice rather than requiring the defendant to show only a substantial denial of a constitutional right?**

D. **Did the Tenth Circuit Court of Appeals err when it denied David Rhodes's request for a Certificate of Appealability?**

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PETITION FOR WRIT OF CERTIORARI

THE PETITIONER, DAVID THOMAS RHODES, by and through his attorney, Clifford J. Barnard, hereby respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the Tenth Circuit Court of Appeals entered on August 7, 1998.

I. OPINIONS BELOW

The Tenth Circuit Court of Appeals affirmed Mr.

Rhodes's conviction by denying his direct criminal appeal on July 22, 1994 in an unpublished opinion in Tenth Circuit case number 93-8083. *See* Appendix A at page 27.

Mr. Rhodes later filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, which the United States District Court for the District of Wyoming denied in an Order dated July 21, 1997. *See* Appendix B at page 44.

On October 21, 1997, the United States District Court entered an Order in which it declined to rule on Mr. Rhodes's Application for a Certificate of Appealability because it did not believe that it had the authority to consider his Application. *See* Appendix C at page 50.

On August 7, 1998, the Tenth Circuit Court of Appeals in an unpublished opinion in case number 97-8097 denied Mr. Rhodes's Application for a Certificate of Appealability. *See* Appendix D at page 55.

On October 15, 1998, Mr. Rhodes's Petition for Rehearing was denied by the Tenth Circuit Court of Appeals. *See* Appendix E at page 61.

II. JURISDICTION

The date of the judgment which is sought to be reviewed is the Tenth Circuit's August 7, 1998 denial of Mr. Rhodes's Application for Certificate of Appealability.

On December 29, 1998, Justice Suter extended the time within which to file the petition for a writ of certiorari to and including March 14, 1999. *See* Appendix F at page 62. Because March 14, 1999 is a Sunday, Mr. Rhodes's petition is due on or before Monday, March 15, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.1. *See also, Hohn v. United States*, 524 U.S. ___, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this petition are the United States Constitution's Fifth Amendment Due Process Clause (*see* Appendix G at page 63) and Sixth Amendment right to counsel (*see* Appendix H at page 63).

The statutory provision involved in this petition are 28 U.S.C. § 2253(c) (*see* Appendix I at page 64) and 28 U.S.C. § 2255 (*see* Appendix J at page 65).

IV. STATEMENT OF THE CASE

A. Nature of the Case

After being denied relief on his direct appeal, Mr. Rhodes brought a collateral attack pursuant to 28 U.S.C. § 2255 in which he requested that his conviction and sentence be set aside because he had been rendered ineffective assistance of

counsel at trial and on appeal. The basis for federal jurisdiction in the District Court was 28 U.S.C. § 2255. The District Court denied Mr. Rhodes's motion (*see* Appendix A) and declined to issue a Certificate of Appealability (*see* Appendix B). The Tenth Circuit then denied Mr. Rhodes's Application for a Certificate of Appealability. (*See* Appendix C.) This petition now follows.

B. Statement of Facts

On September 25, 1991, the Converse County, Wyoming Sheriff's Department received a REDDI report (Report Every Drunk Driver Immediately) from two truck drivers regarding a van which was driving erratically northbound on U.S. Interstate 25. Law enforcement officers responded to the report and located the van at a rest area where they found Mr. Rhodes asleep in the driver's seat. An officer contacted Mr. Rhodes who told the officer that he had not been drinking. The officer did not detect any odor of alcohol; however, he suspected that Mr. Rhodes may have been under the influence of drugs because Mr. Rhodes's pupils were very small.

The officer requested that Mr. Rhodes accompany him to his patrol car at which time the officer inquired as to the ownership of the van. Mr. Rhodes responded by stating that it belonged to a friend. An NCIC check indicated that there was

a fugitive warrant active for Mr. Rhodes. The officer placed Mr. Rhodes under arrest and advised him of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Mr. Rhodes declined to speak with the officer by invoking his right to silence.[1]

Two officers inventoried the van and during the inventory, they saw an electric screwdriver and worn panel screws which aroused their suspicion that drugs may have been hidden in the van, although the officers did not discover any contraband during the inventory search. The officers also suspected that Mr. Rhodes was a drug courier because he had very little luggage with him. The van was impounded and Mr. Rhodes was booked into the Converse County Jail.

Between Mr. Rhodes's booking on September 25, 1991 and the signing of a Permission to Search form on September 27, 1991, the officers' suspicions were heightened when a jail deputy received several strange telephone calls inquiring about Mr. Rhodes and the van.

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[1] Appellate counsel also failed to raise in the Petition for Rehearing the Tenth Circuit's incorrect ruling that Mr. Rhodes's invocation of his right to counsel the day after his arrest but the day before his "consent to search" was based on the Sixth Amendment; because Mr. Rhodes had invoked this right in his civil extradition hearing, he had invoked his Fifth Amendment right to counsel, not his Sixth Amendment right to counsel. *See McDonald v. Burrows*, 731 F.2d 294 (5th Cir.1984).

On September 27, 1991, two officers met with Mr. Rhodes in the Converse County jail and obtained Mr. Rhodes's signature on a Permission to Search form. The Permission to Search form stated that, when executed, the signing party was acknowledging ownership and/or care, custody and control of the vehicle. The form further stated that: "The undersigned ... does hereby voluntarily authorize ... officers ... to search **my** ... motor vehicle ... and ... authorize said officers to remove from **my** ... motor vehicle whatever ... they deem pertinent to their investigation."

The officers searched the van and discovered approximately 34 kilograms of cocaine and a bindle containing a small amount of cocaine. On November 22, 1991, Mr. Rhodes was charged in a one-count federal indictment with unlawful possession with intent to distribute approximately 34 kilograms of cocaine. Prior to trial, Mr. Rhodes filed a motion to suppress the 34 kilograms of cocaine found in the van; the District Court denied the motion.

When the law enforcement officers asked Mr. Rhodes to sign the consent to search form, they already "suspected that there was probably drugs in the vehicle." They suspected this because: (1) at the time of Mr. Rhodes's arrest, one officer had a, "suspicion that [Mr. Rhodes] had been driving under the influence of controlled substances based on reports of erratic

driving and the absence of an alcohol smell on his breath but with dilated pupils of the eyes ..." (2) during the inventory search of the van, the officers had found worn molding screws and an electric screw driver; (3) "Mr. Rhodes' history", i.e. the warrant for a parole violation in a drug case; and (4) the "numerous suspicious phone calls concerning the van" to the Converse County Jail on September 26, 1991. It was because of these suspicions that the officers decided to go back to Mr. Rhodes two days after his arrest to ask him to sign the Permission to Search form.

Furthermore, Mr. Rhodes was interrogated when, without warning, he was confronted with a question of ownership, care, custody and control of the vehicle prior to a request for consent to search the vehicle. The interrogation question was posed not only in the absence of a *Miranda* warning, but also in violation of Mr. Rhodes's previously invoked Fifth Amendment right to counsel and silence. Thus the interrogation question posed without a *Miranda* warning did not merely require suppression of the question, but required suppression of the fruits of the question, namely, the thirty-four kilograms of cocaine, to be suppressed because the questions posed were in violation of Mr. Rhodes's invoked Fifth Amendment right to counsel and silence.

On direct appeal, Mr. Rhodes argued that by getting

him to execute the Permission to Search form, the law enforcement officers were able to elicit incriminating statements of a testimonial nature because, in the circumstances of his case, the specific wording of the Permission to Search form was the functional equivalent of an interrogation. Therefore, Mr. Rhodes argued, the evidence was obtained in violation of his constitutional rights. The Tenth Circuit, relying on *United States v. Gay*, 774 F.2d 368 (10th Cir.1985), held that "the act of asking a defendant if he would consent to a search of the vehicle he was driving does not constitute an interrogation." *United States v. Rhodes*, Appendix A at page 39. However, while Mr. Rhodes is not contesting the holding in *Gay*, he does believe that the Tenth Circuit's reliance on *Gay* was misplaced since he was not arguing that his consent to search constituted an interrogation; rather, Mr. Rhodes was arguing that the interrogation consisted of the officers' request for him to admit that he owned and controlled a van suspected of containing drugs.

In the *Rhodes* decision, the Tenth Circuit also based its opinion in part on *United States v. Morris*, 1 M.J.R. 352, 354 (1976) by noting that, "implicit within an individual's consent to search is an acknowledgment, at the very least, of dominion and control over the property to be searched, but such an acknowledgment does not constitute an interrogation under *Miranda*." (Appendix A at page 40.) However, the Tenth

Circuit ignored the specific limitation given in *Morris* that, "[t]he situation would be materially different had the investigator suspected the accused of auto theft at the time he inquired into ownership of the vehicle. [Citations omitted.]" *United States v. Morris*, 1 M.J.R. at 354 n.6. The situation described in the *Morris* footnote is very similar to the situation in Mr. Rhodes's case where the law enforcement officers suspected Mr. Rhodes of transporting drugs when they inquired into ownership of the van.

V. REASONS FOR GRANTING THE WRIT

A. IT IS INTERROGATION WHEN LAW ENFORCEMENT OFFICERS ASK AN ARRESTED INDIVIDUAL TO ACKNOWLEDGE OWNERSHIP OF A VEHICLE SUSPECTED OF CONTAINING ILLICIT DRUGS.

1. The Writ Should be Granted to Resolve a Conflict between the Circuits.

This Honorable Court should grant certiorari to determine whether the officer's request for Mr. Rhodes to sign a form acknowledging ownership of a vehicle constituted interrogation when the officers already suspected Mr. Rhodes of transporting drugs in the vehicle. The United States Circuit Courts of Appeals are in conflict on this issue and a uniform rule should be established.

The Seventh and Ninth Circuits have ruled that, under certain circumstances, routine questioning regarding consent to search may amount to interrogation. The Tenth Circuit held in Mr. Rhodes's case that an officer's request for an arrested person to acknowledge ownership of a suspect vehicle was not interrogation.

2. The Tenth Circuit Court of Appeals' Holding.

On direct appeal of his criminal conviction, the Tenth Circuit held that "the act of asking a defendant if he would consent to a search of the vehicle he was driving does not constitute an interrogation." (Appendix A at page 39.) However, this was not the point of Mr. Rhodes's argument; rather, Mr. Rhodes was arguing that the officers' request for him to admit that he owned and controlled a van suspected of containing drugs constituted interrogation.

Thus, in his § 2255 motion, Mr. Rhodes claimed that he was denied effective assistance of counsel when his appellate attorney failed to point out the Tenth Circuit's misunderstanding of his argument in a petition for rehearing. In its denial of a Certificate of Appealability, the Tenth Circuit denied Mr. Rhodes due process of law when it departed from rulings of the United States Supreme Court and other circuit courts and held that an arrested defendant was not interrogated

when questioned as to the ownership of a vehicle believed to contain illegal drugs.

3. Other Circuit Court Holdings.

The Seventh and Ninth Circuits have held that, under certain circumstances, routine questioning regarding consent to search may amount to interrogation. As the Seventh Circuit has stated,

> "[w]here the question goes beyond a request for consent and inquires as to ownership of that which is searched, the inquiry crosses the threshold into testimonial incrimination and is therefore barred unless the safeguards of *Miranda* have been put in place. *United States v. Monzon*, 869 F.2d 338, 342 (7th Cir.) ..."

United States v. Smith, 3 F.3d 1088, 1098 (7th Cir.1993). As the Ninth Circuit has stated,

> "[w]hen a police officer has reason to know that a suspect's answer may incriminate him, however, even routine questioning may amount to interrogation. Thus, while there is usually nothing objectionable about asking a detainee his place of birth, the same question assumes a completely different character when an INS agent asks it of a person he suspects is an illegal alien."

United States v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993)

(citations omitted).

Thus, while there is usually nothing objectionable about asking a detainee to sign a consent to search form, the same request assumes a completely different character when the law enforcement officer asks a person to sign a statement confessing ownership, control and custody of a van when the law enforcement officers suspect that person of transporting drugs in the van. In *Henley*, the prosecution "used his admission that he owned the car to link him to the cap, gun and the sunglasses found within it." *United States v. Henley*, 984 F.2d at 1043. In Mr. Rhodes's case, the government used Mr. Rhodes's admission that he had possession, control and/or care of the van to link him to the cocaine found in it.

4. <u>United States Supreme Court Holdings</u>.

The safeguards under *Miranda v. Arizona* apply,

> "whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. ... A practice that the police should know is reasonably likely to

> evoke an incriminating response from a suspect thus amounts to interrogation."

Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980).

In order to establish a Fifth Amendment violation, it must be shown that the evidence obtained during the interrogation was incriminating and testimonial in nature. The Supreme Court defined testimonial evidence as that in which the accused revealed, "directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 595, 110 S.Ct. 2638, 2647, 110 L.Ed.2d 528 (1990) (quoting *Doe v. United States*, 487 U.S. 201, 213, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)). Accordingly, "[t]he vast majority of verbal statements thus will be testimonial because there are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." *Pennsylvania v. Muniz*, 496 U.S. at 596, 110 S.C. at 2648 (internal quotations and citation omitted).

The *Muniz* court focused on the "content" of the writing and made the following distinction:

> "... a 'mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the

> privilege's] protection.' Id. at 266-267, 87 S.Ct. at 1953 (emphasis added). Had the suspect been asked to provide a writing sample of his own composition, the content of the writing would have reflected his assertion of facts or beliefs and hence would have been testimonial ..."

Pennsylvania v. Muniz, 496 S.Ct. at 598, 110 S.Ct. at 2648 (quoting *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)). And, as distinguished from *Doe v. United States* where the consent form did not identify any particular banks, bank accounts or private records, and thus did not communicate any factual assertions, implicit or explicit, nor conveyed any information to the government, the language in the Permission to Search form signed by Mr. Rhodes did exactly that. The use of the word "my" in the form thus "forc[ed] [Mr. Rhodes] to express the contents of his mind." *Pennsylvania v. Muniz*, 496 U.S. at 598, 110 S.Ct. at 2649, citing *Doe v. United States*, 487 U.S. at 210 n.9, 108 S.Ct. at 2347 n.9.

5. Ineffective Assistance of Counsel.

Mr. Rhodes's counsel had the obligation to provide constitutionally effective representation during all stages of the appellate process, a process which included apprising Mr. Rhodes of all proceedings, researching and considering all

applicable law, and presenting that authority in a manner which represented Mr. Rhodes's best interests. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 839, 836, 83 L.Ed.2d 821 (1985). Mr. Rhodes's appellate counsel was deficient in his representation when he failed to research applicable case law that would have countered the Tenth Circuit's opinion and when he failed to present relevant argument to the Tenth Circuit through a petition for rehearing and/or a suggestion for rehearing *en banc*.

The Supreme Court cases of *Innis*, *Muniz* and *Doe* state that a suspect's implicit or explicit communications of a testimonial nature that assist the prosecution to the adverse interest of a suspect may be proscribed. The Tenth Circuit holding in Mr. Rhodes's case that no interrogation occurred was erroneous in light of the facts of the case and the Supreme Court precedents. In Mr. Rhodes's case, this line of authority was wholly available to his attorney since Mr. Rhodes himself had sent copies of the *Muniz* and *Doe* cases to counsel long before oral argument had occurred. Furthermore, Mr. Rhodes had specifically asked counsel to bring this line of authorities to the Tenth Circuit's attention. Even being fully aware of these cases, appellate counsel failed to request a rehearing or a rehearing *en banc* in order to present the conflict between the Tenth Circuit's decision in Mr. Rhodes's case and the opinions in the *Muniz* and *Doe*.

6. Conclusion.

Based on their suspicions, the officers had to have known that the "Permission to Search" form requesting acknowledgment of ownership, care, custody and control of the van was reasonably likely to elicit an incriminating response from Mr. Rhodes. Therefore, this request went beyond a request for a consent to search and amounted to an interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See United States v. Henley*, 984 F.2d at 1043, citing *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986); *Rhode Island v. Innis*, 466 U.S. at 300-01, 100 S.Ct. at 1689.

The officers in Mr. Rhodes's case successfully requested through the execution of the Permission to Search form an admission by Mr. Rhodes of ownership, custody and/or control of a van they strongly suspected contained narcotics. This disclosure contained a testimonial component because Mr. Rhodes's response required him to "communicate an express or implied assertion of fact or belief." *Pennsylvania v. Muniz*, 496 U.S. at 596, 110 S.Ct. 2648. Because Mr. Rhodes's Fifth Amendment rights were violated and his statement should have been suppressed, Mr. Rhodes should be granted a new trial.

B. MR. RHODES WAS DENIED DUE PROCESS OF

LAW WHEN THE TENTH CIRCUIT USED AN INCORRECT HARMLESS ERROR ANALYSIS WHEN OBSERVING THAT THE DEFENDANT COULD NOT HAVE SUPPRESSED ENOUGH OF THE EVIDENCE TO MAKE IT SOMETHING OTHER THAN OVERWHELMING RATHER THAN AN ANALYSIS AFTER PONDERING ALL THAT HAPPENED WITHOUT STRIPPING THE ERRONEOUS ACTION FROM THE WHOLE.

Mr. Rhodes has claimed in this case that trial counsel permitted the government to present to the jury substantial, inadmissible evidence which, when considered in total, swayed the jury. This evidence improperly entered in Mr. Rhodes's trial, along with the exculpatory evidence that Mr. Rhodes claimed should have been presented at trial, should rightfully be considered under the harmless error analysis standard of review as set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

The District Court in denying Mr. Rhodes's ineffective assistance of trial counsel claim relied on the totality of the evidence presented to the jury and concluded that the evidence was overwhelming. The district court relied on the following facts and then stated that this evidence remained unchallenged: (1) Mr. Rhodes was the sole occupant of a van that contained

in hidden compartments thirty-four kilograms of cocaine, three of which had been opened and resealed; (2) Mr. Rhodes's fingerprints were found on a torn page from an Atlas in the van, which page contained cocaine; (3) Mr. Rhodes admitted being a drug dealer; and (4) Mr. Rhodes had discussed plans to obtain and distribute drugs in recorded telephone conversation made months before Mr. Rhodes was arrested in Wyoming.

The Tenth Circuit's observation that Mr. Rhodes "failed to demonstrate that a constitutionally effective counsel could have managed to suppress enough of the evidence against him to make it something other than overwhelming" (Appendix D at page 58) was the wrong standard of review on this matter. A harmless error analysis of constitutional errors in federal habeas cases must be made "after pondering all that happened without stripping the erroneous action from the whole:"

> "In reviewing the record, we are mindful of what the court held in *Kotteakos*, speaking through Justice Rutledge:
>
> > `But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The

> inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'"

Tuttle v. State of Utah, 57 F.3d 879, 884 (10th Cir. 1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)).

Since the proper standard of review for evidence erroneously allowed into trial must be made, according to *Tuttle*, "after pondering all that happened without stripping the erroneous action from the whole," the Tenth Circuit should have considered the effect of this improper evidence on the jury since Mr. Rhodes had challenged each of the facts that the District Court erroneously maintained were not challenged by him:

(1) With regard to Mr. Rhodes being the sole occupant of a van that contained thirty-four kilograms of cocaine, this evidence in and of itself is insufficient as a matter of law to convict Mr. Rhodes. Control of a vehicle without knowledge of contraband in hidden compartments will not support a conviction for possession of contraband. *See, United States v. Richardson*, 848 F.2d 509, 512 (5th Cir.1988); *United*

States v. Gonzales, 703 F.2d 807 (5th Cir.1983). Mr. Rhodes was not the owner of the vehicle in which the cocaine was located and no testimony was presented at trial to demonstrate that Mr. Rhodes was aware of the cocaine located in the hidden compartments or that he had opened or handled the packages of cocaine. Tests for Mr. Rhodes's fingerprints on the thirty-four packages of cocaine were negative, although other individuals' fingerprints were found on the packages. Mr. Rhodes was not in possession of gloves and had specifically testified that he was not aware of the cocaine in the hidden compartments.

(2) With regard to the bindle of cocaine that was found wrapped in a torn page on which Mr. Rhodes's fingerprints were found, Mr. Rhodes claimed that the bindle should have been excluded from trial and there was much to support his claim: rules and regulations require inventory searches to be conducted by opening every package; the officer testified that he looked through the road atlas and would have found the cocaine had it been there; and the District Court determined that the inventory search was conducted according to inventory rules and regulations.

(3) With regard to Mr. Rhodes's admitting being a drug dealer, this evidence was also specifically challenged as evidence that should not have come before the

jury. In particular, Mr. Rhodes challenged the admissibility of his prior convictions with specific emphasis on the fact that the trial court at sentencing found the Mexican conviction unconstitutional. Not only were the convictions allowed to be presented to the jury, but the details of the convictions were also presented. As this Court has stated, "... [i]mproper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." *United States v. Biswell*, 700 F.2d 1310, 1319 (10th Cir. 1983) (citing *United States v. Parker*, 604 F.2d 1327, 1329 (10th Cir. 1978)).

(4) With regard to Mr. Rhodes's prior telephone discussions regarding the purchasing of drugs, the District Court could not use the Georgia tapes to find overwhelming evidence of guilt unless it first determined that the jury could have found beyond a reasonable doubt from other evidence standing alone that Mr. Rhodes had physically done the act charged in the indictment and such a determination in the District Court's finding is absent.

Finally, the Tenth Circuit's finding that the evidence was overwhelming is unfounded in the record of this case. As shown above, the evidence was not overwhelming if the court had not accepted the evidence challenged by Mr. Rhodes.

Because the Tenth Circuit utilized the wrong harmless error standard in denying Mr. Rhodes's Application for Certificate of Appealability, this case should be remanded to the Tenth Circuit with instructions to reconsider this issue under the proper harmless error standard.

C. MR. RHODES WAS DENIED DUE PROCESS OF LAW WHEN THE TENTH CIRCUIT INVOKED A HIGHER STANDARD FOR ISSUING A CERTIFICATE OF APPEALABILITY WHEN IT REQUIRED THE DEFENDANT TO MEET THE ULTIMATE BURDEN OF A SHOWING OF PREJUDICE RATHER THAN REQUIRING THE DEFENDANT TO SHOW ONLY A SUBSTANTIAL DENIAL OF A CONSTITUTIONAL RIGHT.

One issue for which Mr. Rhodes sought a Certificate of Appealability ("COA") by the Tenth Circuit was Mr. Rhodes's claim that appellate counsel failed to file a petition for rehearing when the Tenth Circuit's decision in his case was in conflict with the principles of the United States Supreme Court and Tenth Circuit precedent. In its Order, the Tenth Circuit failed to address this claim and should have granted a Certificate of Appealability so that the parties could fully brief and argue this question.

The Tenth Circuit's decision in denying a COA with regard to Mr. Rhodes's claim of ineffective assistance of trial counsel is in conflict with statutory law regarding Certificates of Appealability. In order to show an entitlement to a COA, an appellant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(1)(B). As pointed out by the Tenth Circuit in its Order (Appendix D at page 56-57), an appellant meets this standard if he shows that his issues, "are debatable among jurists, or that a court could resolve the issues differently, or that the questions deserve further proceedings." *United States v. Sistrunk*, 111 F.3d 91, 91 (10th Cir.1997).

In this case, however, the Tenth Circuit found that Mr. Rhodes was not entitled to a COA because he had failed to show that trial counsel's performance prejudiced him, because the evidence was overwhelming and because Mr. Rhodes had "failed to demonstrate that a constitutionally effective counsel could have managed to suppress enough of the evidence against him to make it something other than overwhelming." (Appendix D at page 58.)

The standard of review in granting a COA does not require an appellant to show prejudice but merely requires a showing that the issue is "debatable among jurists, or that a court could resolve the issues differently, or that the questions

deserve further proceedings." *United States v. Sistrunk*, 111 F.3d at 91. Statutory law, 28 U.S.C. § 2253 (c)(1)(B), merely requires that an appellant make a "substantial showing of the denial of a constitutional right." The Tenth Circuit has held Mr. Rhodes to a standard of ultimate relief as required in *Strickland v. Washington*'s prejudice prong rather than to the lower standard for granting a COA as set forth in 28 U.S.C. § 2253 (c)(1)(B).

Because the Tenth Circuit utilized the wrong standard in denying Mr. Rhodes's Application for Certificate of Appealability, this case should be remanded to the Tenth Circuit with instructions to reconsider this issue under the proper standard for determining if a Certificate of Appealability is warranted.

D. THE TENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DENIED DAVID RHODES'S REQUEST FOR A CERTIFICATE OF APPEALABILITY.

1. Standard of Review

A defendant seeking review of a final order from a motion under 28 U.S.C. § 2255 is now required to request a "certificate of appealability." The requirements of this certificate are set forth in 28 U.S.C. § 2253 which states that an applicant under must make a "substantial showing of the denial

of a constitutional right" (28 U.S.C. § 2253(c)(2)), and the certificate "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

2. Substantial showing of a denial a constitutional right.

Mr. Rhodes has made a substantial showing that he was denied his constitutional rights in the issues that he presented to the Tenth Circuit Court of Appeals.

3. Conclusion

If this Court does not choose to grant certiorari on any of the above-argued issues, Mr. Rhodes requests that the Court order the Tenth Circuit Court of Appeals to issue a Certificate of Appealability on these issues in order to permit Mr. Rhodes to appeal the matters to the Tenth Circuit.

VI. CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the matters presented in this petition. In the alternative, if a writ of certiorari is not issued on each of the issues, Mr. Rhodes requests that the case be remanded to the Tenth Circuit Court of Appeals with an order to that Court to grant a Certificate of Appealability on each of the issues.

DATED this 12th day of March, 1999.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
July 22, 1994
ROBERT L. HOECK
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 93-8083
	)	(D.C. No. 91-CR-107-B)
DAVID THOMAS RHODES,	)	(Dist. of Wyoming)
	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT*

Before EBEL, KELLY and BARRETT, Circuit Judges.

[*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.]

David Thomas Rhodes (Rhodes) appeals from the judgment and sentence entered pursuant to a jury verdict finding Rhodes guilty of knowingly, intentionally, and unlawfully possessing with intent to distribute approximately 75 pounds of cocaine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A).

On September 25, 1991, the Converse County, Wyoming, Sheriff's Department received a REDDI report (Report Every Drunk Driver Immediately) on a van traveling north on Interstate I-25 north of Glendo, Wyoming. Wyoming Highway Patrolman Becker and Poage and Deputy Sheriff Biel responded to the report and located the van at the Orin Junction rest area. Rhodes was asleep in the driver's seat. The van's motor was running.

Patrolman Becker awoke Rhodes and asked for and received his driver's license. Becker told Rhodes that he was following up on a REDDI report. Rhodes responded that he had not been drinking. Becker did not detect any odor of alcohol. Becker did observe, however, that Rhodes' "eyes were extremely pinpoint, tiny," and that, based on his training and experience, such a condition "could be caused by using a controlled substance." (R.,Vol. III at 23).

At Becker's request, Rhodes accompanied him to his patrol car. Becker inquired about the ownership of the van, and

Rhodes responded that it belonged to a friend. Becker then asked the dispatcher to run a National Crime Information Center (NCIC) record check on Rhodes while he performed a road-side sobriety test. Before Becker had completed the test, the dispatcher notified him that Rhodes was wanted on a California fugitive warrant.

Becker placed Rhodes under arrest and apprised him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). In response, Rhodes stated that he did not want to talk to Becker. The evidence is in conflict as to whether Rhodes asked for an attorney at this point in time. Thereafter, Officers Becker and Poage inventoried the van in accordance with standard Wyoming Highway Patrol procedure. During the inventory, the officers observed an electric screwdriver and worn molding screws which caused them to suspect that drugs were hidden in the van. The officers also noticed that Rhodes had very little luggage. The officers did not discover any illegal substances or contraband during the inventory process.

The van was taken to a locked impound lot at a local wrecking yard in Douglas, Wyoming, and Rhodes was transported to the Converse County Jail where he was booked in by Deputy Biel. During the booking process, Biel asked Rhodes if he would allow the officers to search the van. Rhodes responded, "Yes, probably I would. Let me see the form." (R., Vol. III at 199). Biel did not show him the form at

that time, id., but, according to Rhodes, told him, "w[ell, if we decide that we want to go forward with this, we'll come back and ask you another day." Id., at 200.

The next day, September 26, 1991, Rhodes appeared in state court on the California fugitive warrant. At that time, Rhodes requested appointed counsel. Wyoming Assistant Public Defender Steve Kissinger was then appointed to represent Rhodes for the California fugitive warrant matter and a hearing was set for October 2, 1991. Following his appointment, Kissinger met with Rhodes and filed a discovery motion seeing, inter alia, "[a]ll reports, results, and data . . . in connection with this defendant's case, "and" [a] complete list of names, addresses and/or phone numbers of all witnesses . . . interviewed, or interrogated as a result of this criminal prosecution." (R., Vol. I, Tab 59, Exhibit B, Motion for Discovery and Inspection).

On September 27, 1991, Deputies Biel and Kingery interviewed Rhodes about the ownership of the van, during which Rhodes singed a Permission to Search form in which he acknowledged that: he had been apprised of his constitutional right not to have the van searched; he was voluntarily authorizing Biel and Becker to search "my motor vehicle;" and he was giving his written permission to search "freely and voluntarily, without any threats or promises. . . and after having been informed by said officer that I have a right to refuse this

search and/or seizure." See Appendix A.

A search of the van resulted in the discovery of approximately 75 pounds of cocaine located in three hidden compartments in the floor and a small amount of cocaine in a crumpled-up page inside a road atlas sitting on the front seat. Registration checks disclosed that the registered owner of the van was Jose Arroyave of Chicago, Illinois.

On November 22, 1991, Rhodes was charged in a federal one-count indictment with unlawful possession with intent to distribute approximately 75 pounds of cocaine, and he was formally arrested on this charge on November 26, 1991. Rhodes made his first appearance with court appointed counsel, Mr. Donald E. Miller, on December 4, 1991.

Prior to trial, Rhodes filed numerous motions and notices, including a motion to suppress the evidence found in the van, alleging, inter alia:

> 12. THAT on the 27th day of September, 1991, Officer Biel initiated contact with the Defendant and requested permission to search the van driven by Defendant. Defendant's court appointed attorney was not present and had no knowledge that Officer Biel was interrogating the Defendant. Officer Beil did not read Defendant his Miranda warnings on the 27th. The Defendant, after having demanded an attorney on two prior occasions and after having actually been appointed counsel, without advice of counsel, gave permission to Officer Biel to search the van.
>
> 13. THAT law enforcement officers violated

the Defendant's Constitutional Rights as follows:

a. Officer Biel had no right or authority to detain or question Defendant at the rest stop. The Defendant had at all times operated his vehicle in a lawful manner, and at the time he was detained he had been parked in a lawful manner.

b. The initial detention was a pretextual stop. The government now contends that the stop was the result of a REDDI report, but the arresting officers failed to test or determine whether Defendant's ability to operate a motor vehicle was impaired.

c. Law enforcement continued to interrogate the Defendant after he had invoked his right to remain silent and requested an attorney on two separate occasions.

d. Law enforcement approached the Defendant and obtained his written consent to search the van after one; he had invoked his right to remain silent and had requested an attorney, and two; after he had been appointed an attorney. Law enforcement did not obtain either the Defendant's or his court appointed attorney's permission to speak with Defendant, much less obtain his permission to search the van. Such acts violated the Defendant's Fifth and Sixth Amendment right to an attorney as guaranteed by the United States

Constitution. . . .

(R., Vol. I, Tab 58 at 4-5).

Following a hearing, the court made detailed oral findings in denying Rhodes' motion to suppress, including:

> First . . . the initial detention was not pretextual but was a routine traffic stop based upon a reasonable suspicion that the defendant had been driving a vehicle under the influence of drugs such as alcohol or controlled substances and that it was a REDDI report and report of two truck drivers that the van had been driving erratically and almost forced them off the road which caused the stop. So I think there was no pretextual stop involved.
>
> Second, there was no interrogation after the defendant invoked his right to remain silent, except that he was asked to consent to a search, which he gave voluntarily and without coercion, and he was also asked for a social security number which he also gave. He had been read his Miranda rights at the time of his arrest and then he said that he didn't want to talk about it and he wasn't asked about it afterwards.
>
> Third, the Defendant Rhodes gave both oral and written consent to search the van to Officer Becker and to Officer Biel. That - - the defendant was not coerced into giving his consent.
>
> The Court further finds that Becker had reasonable cause to search the van because of his suspicion that he had been driving under the influence of controlled substances based on reports or erratic driving and the absence of an alcohol smell on his breath but with dilated pupils of the eyes and because of a call to Converse County asking about the

> whereabouts of the van. The court finds that no threats or coercion were used upon the defendant to obtain his written consent and that the defendant was not under the influence of any drugs at the time that he gave such consent.
>
> The Court finds that the defendant read and understood what he signed, that the said he was not the owner of the van, that consent to search the van was given by the defendant unrestricted.
>
> The Court further finds that the detention of the van was the result of a reasonable suspicion by Wyoming Highway Patrolman Becker that the defendant was engaged in criminal activity, namely, the possession and use of controlled substances; that the chain of custody was properly maintained; and that the van was validly impounded.
>
> * * *
>
> . . . the Court finds that the defendant was not the owner of the van that was searched . . . . Whether or not the defendant had standing on that account is very doubtful in the opinion of the Court under U.S. v. Obregon, 748 F.2d 1371, Tenth Circuit case in 1984;
>
> * * *
>
> And, finally, based upon the totality of the circumstances, the Court concludes that the defendant's consent to search was voluntary and that the evidence should not be suppressed.

(R., Vol. III at 257-60).

The case proceeded to trial. Rhodes was convicted as charged and sentenced to twenty years imprisonment.

On appeal, Rhodes contends that: (1) he had standing to content the legality of the search of the van which was later

found to contain illegal drugs; (20 the written consent to search was the functional equivalent of an interrogation and/or statement and the fruits of the search should have been suppressed by the district court; and (3) his consent to the search, as determined by the totality of the circumstances, was involuntary base on the violation of this Fifth Amendment rights and the coercive and/or deceptive police actions.

I.

Rhodes contends that he court erroneously ruled at the conclusion of the suppression hearing that he did not have standing to challenge the search of the vān. It is fundamental law that a defendant attempting to suppress evidence discovered as a result of a police search must first establish that he had standing to object to the search. United States v. Salvucci, 448 U.S. 83 (1980).

Rhodes argues that "[i]n this case it is clear that [he] had standing to object to the search and there are no facts which need to be developed further, "and that "the only legal resolution based on the facts in this matter is that the district court's decision should be reversed and the 34 kilograms of cocaine suppressed." (Appellant's Brief at 9.) Rhodes points out that: he was the driver and sole occupant of the van when Patrolman Becker awoke him at the rest stop; the told Becker at that time that the van belonged to a friend, Jose Arroyave; Becker verified that Arroyave owned the van and that the van

had not been reported stolen; and, Becker listed Arroyave as the owner when he inventoried the van on September 25, 1991. The argues that these circumstances established his standing to contest the legality of the search under United States v. Soto, 988 F.2d 1548, 1551 (10th Cir. 1993) and United States v. Rubio-Rivera, 917 F.2d 1271 (10th Cir. 1990).

In Soto, we held that a threshold issue in deciding a motion to suppress is whether the search violated the rights of the defendant and that "[t]his inquiry has evolved into a two-part test: The court must determine whether the defendant has exhibited a subjective expectation of privacy in the area searched, and also whether society is willing to recognize that expectation as being objectively reasonable." 988 F.2d at 1552. We also held, quoting Rubio-Rivera, 917 F.2d at 1275, that "[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." Id. We further observed that "absent evidence that defendant wrongfully possessed the vehicle [evidence that the defendant had borrowed the car form his uncle, car was registered to uncle, and car was not reported stolen] is sufficient to confer standing on him to challenge the subsequent search of the car." 988 F.2d at 1553.

The government responds that although Soto "is the

case most directly on point and at first reading appears to dictate resolving the standing issue in favor of [Rhodes] . . . a closer analysis of this case indicates that the district court was correct in ruling that the Appellant did not have standing to object to the search." (Brief of Appellee at 22). The government contends that Rhodes failed to establish both prongs of Soto because he knew he was borrowing the van from a drug dealer; cars are merely tools of the trade for drug dealers; it was subjectively impossible for Rhodes to believe that he had any expectation of privacy in the van; and society should not recognize any expectation of privacy Rhodes may have had "based on [his] testimony that these cars are just driven all over the country, dumped off, and then later picked up by some other individual." Id. at 23.

Applying Rubio-Rivera and Soto to the facts herein, we hold that Rhodes had standing to challenge the search of the van. Rhodes told Patrolman Becker at the time of his arrest and he later testified at the suppression hearing and at trial that he had borrowed the van from a friend, Jose Arroyave. This testimony was uncontradicted. The government failed to rebut this testimony by evidence that the car did not belong to Arroyave, that the car had been reported stolen, or that Rhodes was operating the car without Arroyave's permission. Rhodes, having offered "sufficient evidence indicating that he [had] permission of the owner to use the vehicle . . . plainly [had] a

reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." Rubio-Rivera, 917 F.2d at 1275.

II.

Rhodes contends that the written consent to search was the functional equivalent of an interrogation and/or a statement that the fruits of the search should have been suppressed.

Rhodes points out that: he was advised of his Miranda rights on September 25, 1991, when he invoked his right to remain silent, such right had to be scrupulously honored; he was not "re-Mirandized" prior to signing the Permission to Search on September 27, 1991; the Permission to Search was an admission that he had custody and control of the van and the functional equivalent of an interrogation and/or statement; and the Permission to Search established a chain of custody linking him to the van and the illegal drugs subsequently fond therein. Based thereon, Rhodes argues that the district court should have found that his right to remain silent had been violated and the court should have suppressed the Permission to Search form and the cocaine found in the van.

The government responds that the act of asking a defendant if he will consent to a search of the vehicle he is driving does not amount to interrogation. The government cites United States v. Gay, 774 F.2d 368 (10th Cir. 1985), in which we, after observing the general rule that the need for

Miranda warnings presupposes the existence of two conditions, custody and interrogation, held that the act of asking a defendant if he would consent to a search of the vehicle he was driving did not amount to interrogation. 774 F.2d at 379. The government further observes that "Rhodes' appointed attorney, Steve Kissinger, appeared at Appellant's initial appearance but was only appointed for [purposes of] the fugitive warrant," and "[t]herefore, at the time the request to search the van was made, Appellant's Sixth Amendment right to counsel, as to any other crime other than the fugitive warrant, had not yet attached." (Brief of Appellee at 12-13).

Miranda defined "interrogation" as "questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." 384 U.S. at 444.

We agree with the government that under Gay the act of asking a defendant if he would consent to a search of the vehicle he was driving does not constitute an interrogation. Gay reasoned that a request to search "cannot be said to lead to an incriminating response," citing to W. La Fave and J. Isreal, 1 Criminal Procedure § 6.7(a) (1984). Gay, 774 F.2d at 379. See also United States v. Parra, 2 F.3d 1058, 1067 (10th Cir. 1993), cert. denied, ___U.S.___(1993), (routine booking questions do not normally constitute interrogation because they do not normally elicit incriminating responses); United States

v. Morris, 1 M.J. 352, 354 (1976) (implicit within an individual's consent to search is an acknowledgment, at the very least, of dominion and control over the property to be searched, but such an acknowledgment does not constitute an interrogation under Miranda.) [1]

III.

Rhodes contends that his consent to search, as determined by the totality of the circumstances, was involuntary as the result of both the violation of his Fifth Amendment rights and coercive and deceoptive police practices. "To admit evidence obtained in a consent search, a district court must find from the totality of the circumstnaces that (1) the defendant's consent to an officer's serach was voluntary and (2) the search did not exceed the scope of the defendant's consent." United States v. Price, 925 F.2d 1268,

---

[1] To the extent that Rhodes impliedly also alleges a Sixth Amendment violation, that claim is without merit. In contrast to a Miranda claim, the Sixth Amendment right to counsel is offense-specific. McNeil, 111 S.Ct. at 2207. Rhodes invoked his Sixth Amendment right to counsel when he appeared in state court on September 26, 1991 on the California fugitive warrant. However, when Deputies Biel and Kingery interviewed Rhodes on September 27, 1991 about the ownership of the van, the encounter was unrelated to the fugitive charge. Accordingly, Rhodes' invocation of his Sixth Amendment right to counsel with respect to the fugitive charge poses no bar to the admission of evidence gathered after he consented to a search of the van.

1270 (1991). See United States v. Soto, 998 F.2d 1548, 1557 (10th Cir. 1993); United States v. Nicholson, 983 F.2d 983, 988 (10th Cir. 1993); United States v. Dewitt, 946 F.2d 1497, 1500 (10th Cir. 1991), cert. denied, ___U.S.___(1992).

a.

Rhodes contends that his Fifth Amendment rights were violated when, after he had invoked his right to remain silent and had asked for an attorney, "the Deputy Sheriffs initiated contact with him . . . without his ocurt appointed attorney; and they then failed to read him his Miranda rights and obtained an incriminating statement from him." (Appellant's Brief at 17). This issue was carefully considered and decided adversely to Rhodes in II., supra, and need not be revisited here.

b.

Rhodes contends that his consent to sign the Permission to Search was obtained by deception.

Officers may search an area iwthout a warrant or probably cause when a person in control of the area ha sgiven his or her voluntary consent to the search. Schneckloth, 412 U.S at 227-28; United States v. Mendenhall, 446 U.S. 544, 557 (1980). The voluntariness of consent tis a question of fact to be determined from the totality of the circumstances. McNeely, 6 F.3d at 1452. "Accordingly, we will not substitute our judgment for the district court's factual findings unless, viewing the facts in a light favorable to the court's

determinatino, those findings are cleraly erroneous." Id. In United States v. Griffin, 7 F.3d 1512, 1517 (10th Cir. 1993), citing to Florida v. Bostick, ____U.S.___, 111 S.Ct. 2382, 2386 (1991), we held that an officer's request for consent to search does not taint an otherwise consensual encounter "as long as the police do not convey a message that compliance iwth their reqeust is required." See also United States v. Lindsey, 877 F.2d 777 (9th Cir. 1989) (voluntary consent found absent any police threats or coercion).

Rhodes argues that he did not voluntarily consent to the search and that he was deceived at the time he signed the Permission to Search becuase he had "relied on the fact that the initial inventory did not reveal any illegal substances," (Appellant's Brief at 25), and becuase "he had herad the dispatcher mention that there were no drugs found in the inventory." Id. at 26. Rhodes argues that, "as a result of the deception pertaining to the incriminating evidence which was found, or should have been found, on the front seat of the van," id. at 27, he did not make a free and deliberate choice in signing the Permission to Search, and his motion to suppress should have been granted.

Rhodes testified in detail during the suppression hearing relative to the circumstances under which he signed the Permission to Search. Thereafter, the district court made specific, detailed findings that: Rhodes gave both oral and

written consent to the search: "no threats or coercion were used upon the defendant to obtain his written consent and that the defendant was not under the influence of drugs at the time that he gave such consent;" and the "consent to search given by the defendant was knowing and voluntary." (R., Vol. III at 258-59).

We have carefully reviewed the suppression proceedings. We hold that the district court's findings are supported by the record and are not clearly erroneous. The district court did not err in denying Rhodes' motionto suppress.

AFFIRMED.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

APPENDIX B

FILED
DISTRICT OF WYOMING
CHEYENNE
97 JULY 21
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 96-CV-v. 255-B
	)	
	)	
DAVID THOMAS RHODES,	)	Crim. No. 91-CR-107-B
	)	
Defendant.	)	

ORDER DENYING RHODES'S MOTION TO VACATE CONVICTION AND SENTENCE

Defendant David Thomas Rhodes ("Rhodes") filed a Motion to Vacate Conviction and Sentence pursuant to 28 U.S.C. § 2255, claiming that his counsel rendered ineffective assistance at the trial and appellate levels. The government opposes the motion. After reviewing the materials on file, the Court FINDS and ORDERS as follows:

Background

On September 25, 1991, Wyoming Highway Patrolman

Clinton Becker received a REDDI report (Report Every Drunk Driver Immediately) on a van traveling north on Interstate I-25 north of Glendo, Wyoming. As Patrolman Becker drove south on I-25, a truck driver notified him that the van was parked at the Orin Junction rest area. Patrolman Becker found Rhodes asleep in the driver's seat with the engine running.

Patrolman Becker awoke Rhodes and asked for and received his driver's license. Becker informed Rhodes that he was pursuing a REDDI report. Rhodes responded that he had not been drinking. Becker did not detect any alcohol. Becker observed, however, that Rhodes's "eyes were extremely pinpoint, tiny," and that based on his experience and training, such a condition "could be caused by a controlled substance." (R., Vol. III at 23).

Rhodes accompanied Becker to his patrol car. Becker inquired about the ownership of the van. Rhodes responded that it belonged to a friend. Becker then asked the dispatcher to run a Nation al Crime Information Center record check on Rhodes. The dispatcher notified Becker that Rhodes was wanted on a California fugitive warrant.

Becker placed Rhodes under arrest and apprised him of his Miranda rights. Rhodes responded that he did not want to talk to Becker. Thereafter, Officers Becker and Poage inventoried the van according to Wyoming Highway Patrol procedure. During the inventory, the officers observed an

electric screwdriver and worn molding screws that caused them to suspect contraband was hidden in the van.

The van was taken to a local impound yard in Douglas, Wyoming and Rhodes was taken to the Converse County Jail. During the booking process, Deputy Biel asked Rhodes if he would allow the officers to search the van. Rhodes responded that he probably would. The officer told Rhodes that if they decided to go forward with the search they would come back and request permission again another day.

On September 21, 1991, Deputies Biel and Kingery interviewed Rhodes about the ownership of the van. During the interview, Rhodes singed a Permission to Search form and acknowledged that he had been informed of his constitutional rights and that he was giving permission to search the van freely and without coercion.

In searching the van, the officers discovered thirty-four kilograms of cocaine in three hidden compartments in the floor of the van. A small amount of cocaine was found in a bindle located inside a road atlas sitting on the front seat.

On November 22, 1991, Rhodes was charged with unlawful possession with intent to distribute approximately 75 pounds of cocaine. The case proceeded to trial and Rhodes was convicted Rhodes appealed and this Court was affirmed.

Analysis

To establish ineffective assistance of counsel, Rhodes

must show: (1) that his attorney's performance was constitutionally deficient; and (2) that his deficient performance was prejudicial. United States v. Kissick, 69 F.3d 1048, 1054 (10th Cir.1995) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). A court need not determine whether counsel's performance was constitutionally deficient before examining the prejudice suffered by the defendant. Strickland, 466 U.S. at 697. To establish the required prejudice, a defendant must demonstrate that counsel's deficient performance rendered the proceeding "fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

In all, Rhodes asserts nine different bases for his ineffective assistance of counsel claim. The more meritorious examples include: presenting otherwise inadmissible evidence of Rhodes's prior convictions and prior arrests; failing to investigate impeachment evidence regarding a prosecution witnesses's prior false sworn answers; and failing to file a petition for rehearing with the Tenth Circuit. Rhodes does not claim that defense counsel failed to present exculpatory evidence or evidence that would otherwise support Defendant's theory of the case. Rather, Rhodes's contentions focus on defense strategy and the alleged failure to properly attack the government's case by impeaching prosecution witnesses and by submitting what amounts to cumulative evidence. In short, Rhodes's ineffective assistance of counsel claim alleges errors

in peripheral matters rather than matters central tot he case.

In analyzing Rhodes's ineffective assistance of counsel claim, the Court must consider the totality of the evidence presented to the judge and jury. United States v. Owens, 882 F.2d 1493, 1501 (10th Cir. 1989). In the instant case, the evidence presented to the jury was overwhelming. Even if the Court assumes Rhodes's contentions to be true, the following evidence remains unchallenged: Rhodes was the sole occupant of a van that contained thirty-four kilograms of cocaine in three hidden compartments; three of the kilograms had been opened and resealed; Rhodes's fingerprints were found on a torn page from an Atlas in the van; the torn page contained cocaine; and Rhodes admitted being a drug dealer and discussed plans to obtain and distribute drugs in recorded telephone conversations made two months before Rhodes was arrested in Wyoming. In light of this substantial and damning evidence, the Court finds the alleged errors committed by Rhodes's counsel insufficient to undermine the validity of his conviction.[1] In short, the errors alleged fail to convince the Court that Rhodes's trial was "fundamentally unfair or unreliable."

Conclusion

---

[1] Based upon the record, the Court also finds Rhodes's appellate counsel's decision not to petition for any rehearing by the Tenth Circuit a sound exercise of his discretion.

Based on the foregoing, the Court **DENIES** Rhode's Motion to Vacate Conviction and Sentence.

Dated this 18th day of July, 1997

/s

UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
DISTRICT OF WYOMING
CHEYENNE
97 OCT 21 PM 4 09
CLERK

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	No. 96-CV-255-B
	)	
DAVID THOMAS RHODES,	)	
	)	
Defendant/Petitioner.	)	

ORDER ON APPLICATION FOR CERTIFICATE OF APPEALABILITY

This matter is before the Court on David Thomas Rhodes' Application for Certificate of Appealability. The Court FINDS and ORDERS as follows:

Background

Petitioner Rhodes was arrested on November 22, 1991 and charged with unlawful possession with intent to distribute approximately 75 pounds of cocaine. A jury found Rhodes

guilty as charged. That conviction was affirmed on appeal.

On September 20, 1996, Rhodes filed a Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255. In that motion, Rhodes sought relief based on his counsel's purported ineffective assistance at trial. This Court denied the Motion on July 18, 1997. Rhodes now sees a Certificate of Appealability in order to appeal the Court's denial of his § 2255 motion. The Court concludes that it lacks the authority to either grant or deny Rhodes' motion.

Analysis

In 1994, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 102 of that Act prescribes the procedures to be followed by a movant seeking permission to appeal a district court's denial of a § 2255 motion:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(1)(A) & (B) (emphasis added).

Another section of the Act, § 103, altered Fed. R. App. P. 22 to read as follows:

> (b) CERTIFICATE OF APPEALABILITY. --

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253© or title 28, United States Code . . . .

Fed. R. App. P. 22(b) (emphasis added).

The import of § 2253(c)(1) -- § 102 of the Act -- is unambiguous: a district court lacks the authority to consider an application for a certificate of appealability; that task is reserved for a "circuit justice or judge." Notwithstanding this language, § 103 of the Act, which as noted amended Fed. R. A.P.. P. 22, provides in equally plan language that when a state prisoner proceeds under § 2254 a district court has such authority. Thus, §§ 102 & 103 are in conflict with respect to a district court's authority to entertain a state prisoner's certificate of appealability application. No language in § 103 of the Act, however, can fairly be read as undermining § 103's plain statement that a district judge has no authority to issue an appealability certificate to a federal prisoner proceeding under § 2255.

Despite the young age of these provisions, this issue has been previously considered. In United States v. Cota-Loaiza, 936 F. Supp. 756, 761 (D.Colo. 1996), for example, a district court recognized the "internal inconsistency of the Act, the lack of a clarifying amendment by Congress, the disagreement among the district courts regarding the Act's meaning, and the

absence of authority from the circuit courts." It nonetheless concluded based on the plain language of §§ 102 and 103 that it lacked the authority to consider a federal prisoner's certificate of appealability application. Id. at 759-761. Other courts have adopted this reasoning and reached the same conclusion. See e.g., United States v. Johnson, 940 F.Supp. 167, 171 (W.D. Tenn. 1996); Parker v. Norris, 929 F. Supp. 1190, 1192 (E.D. Ark. 1996); but see Houchin v. Zavaras, 924 F.Supp. 115 (D.Colo. 1996). This Court expressly does so now.

Rhodes is a federal prisoner and therefore a movant under § 2255. Consequently, his application for a certificate of appealability is appropriately directed not to this Court, but to the United States Court of Appeals for the Tenth Circuit.[1]

Conclusion

Based on the foregoing, the Court concludes it has no authority to consider Petitioner's application.

Dated this 21st day of October, 1997.

---

[1] In any event, Rhodes' application is lacking in merit. As this Court noted in denying Rhodes' § 2255 motion, the evidence against Rhodes was overwhelming, he could not demonstrate prejudice due to the purported ineffective assistance of counsel, and his arguments "allege[d] errors in peripheral matters rather than matters central to the case."

s/

UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit
Aug 7 1998
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 97-8097
	)	(D.C. No. 96-CV-
DAVID THOMAS RHODES,	)	255-B)
	)	(D. Wyo.)
Defendant-Appellant.	)	

ORDER AND JUDGMENT*

[* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.]

Before BALDOCK, EBEL, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. We grant appellant's motion to supplement his statement of reasons for oral argument. We do not find his additional reasons persuasive, however. The case is therefore ordered submitted without oral argument.

Defendant-appellant David Thomas Rhodes seeks a certificate of appealability (COA) in order to proceed with hi s appeal from the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence.[1] See 28 U.S.C. § 2253(c)(1)(B). We deny appellant a COA, and dismiss his appeal.

In order to show his entitlement to a COA, appellant must make "a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). An appellant meets this standard if he shows that his issues "are debatable among jurists, or that a court could resolve the issues differently, or

---

[1] Appellant was convicted of possession with intent to distribute cocaine. The facts surrounding his offense are detailed in our decision on his direct appeal. See United States v. Rhodes, No. 93-8083, 1994 WL 386026 (10th Cir. July 22, 1994).

that the questions deserve further proceedings." United States v. Sistrunk, 111 F.3d 91, 91 (10th Cir. 1997).

As his basis for relief, appellant alleges that his trial and appellate counsel were constitutionally ineffective. In order to establish ineffective assistance of counsel, a movant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish the "prejudice" element, he must who that but for this ineffective assistance the result would have been different. Id.

I. Ineffectiveness of trial counsel

Appellant contends that this trial counsel: (1) should not have presented evidence concerning his prior drug offense convictions are arrest on drug charges; (2) should have objected to the prosecution's inquiry about the underlying facts of his convictions; (3) should have moved to suppress a bindle of cocaine found in a road atlas inside the van; (4) should have investigated evidence to impeach one of the prosecution's witnesses; (5) should not have elicited a law enforcement officer's opinion that that witness was honest; (6) should have entered into evidence tools found in the van; and (7) should have entered an arrest photo of appellant into evidence. He further contends that the cumulative effect of these errors denied him a fair trail.

We have carefully reviewed appellant's brief and the

record. We conclude that even if appellant's trial counsel performed deficiently, appellant has failed to show that his performance prejudiced him. The evidence in this case against appellant was simply overwhelming. Moreover, appellant has failed to demonstrate that a constitutionally effective counsel could have managed to suppress enough of the evidence against him to make it something other than overwhelming.

II. Ineffectiveness of appellate counsel

1. Chickelero tapes

Appellant contends that his appellate counsel was ineffective in failing to appeal the district court's decision concerning admissibility of tapes on which he is heard to discuss cocaine sales with informant Elbert Ckickelero. "When a defendant alleges his appellate counsel rendered ineffective assistance e by failing to raise an issue on appeal, we examine the merits of the omitted issue. If the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." United States v. Cook, 45 F.3d 388, 393 (10th Cir.1995) (citations and quotation omitted). Having reviewed the record, we conclude that if the district court erred in conducting its Fed.R.Evid. 404(b) analysis, such errors were harmless. See United States v. Sarracino, 131 F.3d 943, 949 (10th Cir.1997) (applying harmless error analysis to Rule 404(b) issue).

2. Failure to petition for rehearing

Appellant contends that his counsel should have filed a petition for rehearing of this court's decision in his direct appeal, United States v. Rhodes, No. 93-8083, 1994 WL 386026 (10th Cir. July 22, 1994). A petition for rehearing will be granted only if the court has overlooked or misconstrued a significant issue. See 10th Cir.R.40.1. Appellant fails to convince us that the result reached by the panel which previously considered this issue was incorrect and that his petition for rehearing should have been granted. His counsel therefore was not ineffective for failing to move for rehearing.

III. Evidentiary Hearing

Appellant asserts he was entitled to an evidentiary hearing. Section 2255 provides that an evidentiary hearing shall be provided "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. Having reviewed the record, we conclude that the record contains a conclusive basis for rejecting appellant's issues. Further factual development was not required in this case. Cf. Moore v. United States, 950 F.2d 656, 660-61 (10th Cir.1991) (discussing evidentiary hearing standard, and finding that record did not allow disposition without hearing).

Appellants application for a certificate of appealability is DENIED and his appeal is DISMISSED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 97-8096
	)	
DAVID THOMAS RHODES,	)	
	)	
Defendant-Appellant	)	
	)	

ORDER
Filed October 15, 1998

Before **BALDOCK, EBEL**, and **MURPHY**, Circuit Judges.

Appellant David Rhodes' petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER,
Clerk of the Court

by: s/
Deputy Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

AREA CODE 202
479-3000

December 29, 1998

Mr. Clifford Barnard
1790 30th Street
Suite 305
Boulder, CO 80301

Re: David Thomas Rhodes
v. United States
Application No. A-532

Dear Mr. Barnard:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer who no December 29, 1998, extended the time to and including March 14, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

s/
Sandra Elliott Spagnolo
Assistant Clerk

APPENDIX G

Fifth Amendment to the United States Constitution:

> **Grand Jury - indictment - jeopardy - process of law - taking property of public use.** No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

APPENDIX H

Sixth Amendment to the United States Constitution:

> **Rights of accused.** In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

APPENDIX I

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

. . .

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX J

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

. . .

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

. . .